WT 08-165

Federal Communications Commission
Washington, D.C. 20554

FILED/ACCEPTED

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Federal Communications Commission
Office of the Secretary

February 17, 2010

The Honorable Mike Thompson
Member, U.S. House of Representatives
712 Main Street, Suite 1
Woodland, CA 95695

Dear Congressman Thompson:

This letter is in response to your inquiry to the Federal Communications Commission dated January 18, 2010. In your inquiry, you forward a letter from Ruth Uy Asmundson, Mayor of the City of Davis, California, concerning the siting of wireless telecommunications towers under Section 704 of the Telecommunications Act of 1996. Among other concerns, Mayor Asmundson states that a recent FCC Declaratory Ruling establishing timelines for local review of telecommunications siting applications affords insufficient opportunity for community notice and public comment. Mayor Asmundson also requests clarification that Section 704 permits local governments to require that siting applicants demonstrate gaps in coverage, that aesthetic impacts may constitute substantial evidence for denying an application, and that local governments may enforce reasonable time, place, and manner regulations on the use of public utility easements.

Section 704(a) of the 1996 Act, codified at 47 U.S.C. § 332(c)(7), preserves state and local authority over zoning and land use decisions for personal wireless service facilities, subject to certain limitations on local authority. Among other things, a state or local government may not regulate in a manner that prohibits or has the effect of prohibiting the provision of personal wireless services. In addition, it must act on applications within a reasonable period of time, and any denial of an application must be made in writing based on substantial evidence in a written record. Allegations that a state or local government has acted inconsistently with Section 332(c)(7) are to be resolved exclusively by the courts (with the exception of cases involving regulation based on the health effects of radio frequency emissions, which can be resolved by the courts or the Commission).

On November 18, 2009, the Commission adopted the above-referenced Declaratory Ruling that granted in part and denied in part a petition from CTIA—The Wireless Association (CTIA). Among other things, the Declaratory Ruling interprets a "reasonable period of time" under Section 332(c)(7) as presumptively 90 days for collocations and 150 days for all other facility siting applications. Under the Declaratory Ruling, if a jurisdiction fails to act on an application within the applicable time limit, an applicant may file a claim for relief in court within 30 days of the failure to act. The Commission rejected CTIA's request that such an application be "deemed granted," instead leaving it to the court to decide what action to take based on all the facts of the case.

The Commission concluded, based on the record before it, that its presumptive timeframes ordinarily allow sufficient time for local governments to consider facilities siting applications. The Commission therefore found that the Declaratory Ruling achieves a balance by defining reasonable and achievable timeframes for state and local governments to act on zoning applications for beneficial wireless broadband and other wireless services, while not dictating any substantive outcome in any particular case or otherwise limiting state and local governments' fundamental authority over local land use.

On December 17, 2009, five local government associations filed a petition requesting that the FCC reconsider or clarify the portion of the Declaratory Ruling that limits to the first 30 days of the review period the ability of local governments to toll the time clock due to an incomplete application. The petition specifically raises the issue of whether the clock should be stopped where necessary to accommodate other review processes such as state environmental review. In addition, on January 14, 2010, the City of Arlington, Texas, filed a petition for review of the FCC's Declaratory Ruling in the Fifth Circuit Court of Appeals.

Except as stated in the Declaratory Ruling, the Commission has not interpreted the language of Section 332(c)(7). For example, the Commission has not considered the extent to which local governments "may require telecommunications providers to demonstrate gaps in coverage." In addition, the Commission has not considered whether or under what circumstances aesthetic impacts may provide substantial evidence for modification or denial of siting requests. Therefore, questions such as what showings a local government may lawfully require or whether the evidence adduced in a zoning proceeding meets the "substantial evidence" requirement of Section 704 are appropriately addressed by the courts.

Finally, Mayor Asmundson contests the assertion of New Path Networks that it is entitled as of right to erect poles and other equipment in utility easements because it is a "telephone company" or "CLEC." This issue does not appear to implicate Section 332(c)(7). It is unclear from Mayor Asmundson's letter whether New Path is asserting rights under another provision of the Communications Act or whether this is solely a question of state law.

I appreciate your interest in this matter and am enclosing a copy of the Declaratory Ruling for your use. We will ensure your letter and the letter you forwarded from Mayor Asmundson are included in the record of the Commission's current proceeding involving the Declaratory Ruling. Should Mayor Asmundson and the City of Davis wish to participate further in this proceeding, they may submit *ex parte* comments in WT Docket No. 08-165 through the Commission's ECFS filing interface located at the following Internet address: http://www.fcc.gov/cgb/ecfs/.

Please do not hesitate to let me know if you have any questions or further concerns.

Sincerely,

Jeffrey S. Steinberg, Deputy Chief
Spectrum and Competition Policy Division
Wireless Telecommunications Bureau

# FAX MEMORANDUM

**Congressman Mike Thompson**
**Woodland District Office**

WTP
Sitting
066

TO: FCC - Legislative

FROM: Elly Fairclough

Fax #

Number of pages (including cover sheet): 4

RE: Telecom Towers

DATE: 1-18-10 TIME: PDT

MESSAGE/COMMENTS:

Thank you for responding
to this letter from a local govt.

**Woodland District Office**
**712 Main Street, Suite 1**
**Woodland, California 95695**
**530-662-5272**
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MIKE THOMPSON
1ST DISTRICT, CALIFORNIA

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WAYS AND MEANS

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515
January 18, 2010

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Michael Perko, Acting Director
Office of Legislative Affairs
Federal Communications Commission
445 Twelfth Street, SW, Room 8-C445
Washington, DC 20544

Dear Mr. Perko:

I am writing to forward to your attention a letter that I received from the City of Davis that concerns the siting of wireless telecommunications towers under Section 704 of the Telecommunications Act of 1996. Among the city's concerns, outlined in six points, is the November 18, 2009 FCC Declaratory Ruling that establishes limited timelines for local review of telecommunications applications.

From the city's experience there is insufficient opportunity for community notice and public comment. The city also asks that service providers be required to demonstrate gaps in coverage before permits are sought.

The city notes that it has approved a score or traditional cellular sites with more than 40 cellular vendors, on public and private property, over a 10-square-mile area. The concern with a pending wireless application is the allowance for vendors to escape appropriate time, place and manner regulations of cities and counties. The authority of local governments in the placement of wireless service facilities can too easily be sidestepped.

Thank you for responding in detail to this letter. Please direct the FCC reply to my Woodland district office.

Sincerely,

Mike Thompson

MIKE THOMPSON
Member of Congress

MT:ef

FAXED

CITY COUNCIL

Ruth Uy Asmundson, *Mayor* – Don Saylor, *Mayor Pro Tem*
*Councilmembers:* Lamar Heystek, Stephen Souza, Sue Greenwald

23 Russell Boulevard – Davis, California 95616
Phone: 530/757-5602 – FAX: 530/757-5603 – TDD: 530/757-5666
1300 AM www.cityofdavis.org

Davis California

January 5, 2010

Congressman Mike Thompson
231 Cannon Office Building
Washington DC, 20515

**RE: Telecommunications Act and NewPath Networks**

Dear Congressman Thompson:

On behalf of the Davis City Council, I am writing to you to describe issues that have come to the forefront recently here in Davis in regards to Section 704 of the Telecommunications Act of 1996, as it was written and as it is interpreted. The key issue is the extent to which the Act allows wireless communication companies to escape appropriate time, place and manner regulation by cities and counties and then to install poles, towers, and other facilities on any public street or utility easement, much less on property of unwilling homeowners. Although the Act states that it preserves the authority of local governments regarding the placement of wireless service facilities, practice and interpretation apparently say otherwise.

The City's Telecommunications Ordinance was approved with extensive public participation. We have approved a score of traditional cellular sites with more than 40 cellular vendors, on public and private property, in our 10 square miles.

Despite our strong record in considering and approving telecommunications facilities, the City of Davis is currently involved in a dispute with NewPath Networks over its proposed installation of 21 antennas throughout our community, including many in residential neighborhoods and greenbelts. These would be mainly on new poles exceeding 40 feet high. NewPath has asserted that it has complete authority to install its equipment in utility easements wherever it wishes, and that the city is fully preempted from regulating the location of any of NewPath's facilities. It is our understanding that New Path takes this position because it asserts that it is a "telephone company" or "CLEC" rather than a "wireless communications company. However, New Path's facilities are wireless facilities, including monopole antennas, and it sells its services and facilities to wireless providers who care to pay for use of NewPath's facilities.

Residents are very upset, especially those who face the prospects of having the equipment, including monopoles in excess of 40 feet high installed on their own properties without requirements for notice or homeowner consent.

We appreciate any assistance that you can provide to Davis and other communities wishing to respond to resident concerns and preserve community aesthetics. Specific areas that we would like to see addressed include:

1. Clarification that public utility easements are not governed by regulations on rights-of-ways. These easements are in the yards of homeowners and deserve special protection.

2. Clarification that providers, such as NewPath, are subject to reasonable time place and manner regulation of facilities in the rights of way and in public utilities easements utilities, including where and what they may construct facilities within public utility easements.

3. Confirmation that communities may require telecommunications providers to demonstrate gaps in coverage before they are granted permits for additional facilities, or an increase in tower height beyond that ordinarily permitted. Our Telecommunications ordinance states that towers must be designed at the minimum functional height. Applicants in Davis have been reluctant to provide the information that allows us to make this determination, saying that it is proprietary.

4. Recognition that aesthetics impacts provide substantial evidence re for modification or denial of applications to site wireless telecommunications facilities, even if the denial results in increased cost or inconvenience for providers. (See, i.e. Sprint PCS Assets, LLC v. City fo Palos Verdes Estates, 583 F.3d 716(2009).)

5. Reconsideration of the November 18, 2009 FCC Declaratory Ruling that establishes extremely limited timelines for review of telecommunications applications. We need to have the opportunity for community notice and public comment. We are also concerned that these timelines do not adequately allow for appropriate review under CEQA. This potentially places us at risk of being forced to choose between violating state or federal law – not a choice we want to have to make.

6. Affirmation that local governments, with input from their residents, are not preempted from reasonable regulation of the streets and rights of way and provision of actual and meaningful notice to cities and counties before a provider is granted authority to build new facilities within the jurisdiction, including the type of facilities that are proposed to be constructed. The streets and rights of way provide the essential environment and connection within their communities and are, in the first instances purchased or acquired by the residents within the community.

We very much appreciate your willingness to look into this situation. We plan on approaching State Senator Lois Wolk with a similar request regarding California Public Utilities Code Section 7901 and 7901.1. If you have questions or need any additional information, please feel free to contact my office at 530-757-5602.

Sincerely,

Ruth Uy Asmundson, Ph.D.
Mayor
City of Davis

Cc: City Council
Elly Fairclough, Yolo County District Representative
Lois Wolk, California State Senator
NewPath Networks